Comparing Implied and Express Constitutional Freedoms

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Both the United States and Australia are constitutional democracies with a common law heritage. Both value free speech, but they have different means of implementing that value. Until recently, that difference was between a common law principle and a judicially protected constitutional freedom. Australian courts used freedom of speech as a tool of statutory construction.[1] The Australian Constitution has no free speech clause, and for many years it was assumed that the power of Parliament was not limited by any constitutionally protected freedom.[2] This assumption proved wrong when the High Court, in *Australian Capital Television Pty Limited v The Commonwealth*,[3] held that freedom of political discussion is implicit in the Constitution because it is a necessary element of repre-

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1 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523, per Brennan J; *Potter v Minahan* (1908) 7 CLR 277, 304, per O'Connor J.

2 'A court will interpret laws of the Parliament in light of a presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms, but the court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political rights which, in the court's opinion, should be preserved': *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 43, per Brennan J.

3 (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1; *Stephens v West Australian Newspapers Ltd* (1994) 124 ALR 80; and *Cunliffe v Commonwealth* (1994) 124 ALR 120.

sentative democracy, a basic principle inferred from the structure and express provisions of the Australian Constitution. This 1992 decision adds a new dimension to the debate on whether to adopt a constitutional provision on free speech in Australia.[4] The question is no longer only whether freedom of speech should be constitutionally protected, but also whether such protection should be based on a new express clause or continue to be implied from existing provisions.

Interpretation is necessary to apply a Constitution to a specific situation. The process ranges from declaring the plain meaning of text to creating principles with no specific textual roots. Along this spectrum, the interpretation of express language is not always clearly distinguishable from implying a principle from the document's language or structure. Some may even argue that these are false categories. The categories are recognised in practice, and for the purpose of addressing whether to support an express constitutional provision on freedom of political discussion in Australia, it is argued that the distinction makes a difference.

This note addresses the differences between express and implied constitutional freedoms, but it does not attempt to directly compare Australia with the United States. Three years is too short a period to discern with any confidence the ultimate scope of the implied freedom of political discussion in Australia or the standards that will be applied. Further, the historical development of the principle in the society, the traditions of the judiciary, and the personality and background of the specific judges are more important influences on the ultimate contours of a judicially protected freedom than whether it is expressly secured in the Constitution. Nevertheless, the American experience is relevant to evaluating the contrast between an express and an implied clause.

THE ENTRENCHMENT OF AN EXPRESS CONSTITUTIONAL PROVISION

An express freedom is more entrenched than if it were only implied. There is objective evidence of public support for it, it is more likely to become a part of the core educational process for citizens, the judicial role in interpretation is less open to criticism, and there are fewer ways to terminate it. It does not mean the implied principle is likely to be repudiated, but courts may give greater deference to government than if the implication were made explicit. Whether that is an advantage depends on the degree to which such deference is considered desirable.

[4] Philip Alston (ed.), *Towards an Australian Bill of Rights* (Canberra: Centre for International and Public Law, Australian National University, Human Rights and Equal Opportunity Commission, 1994).

Evidence of Political Support

The express provision provides direct evidence that a supermajority[5] at one time coalesced on the importance of the stated principle. By placing it in the Constitution, Parliament showed agreement not only upon its verbal formulation, but upon its nature as fundamental. It is a result of a process spelled out in the foundational document. An implied freedom lacks a similar imprimatur.

The Constitution prescribes processes for establishing a principle to limit the power of the government. Following those processes to obtain an express provision in the Constitution is difficult and requires widespread popular support. Its adoption does not show that supporters understood or agreed upon its meaning, but it does demonstrate agreement on the need to make specific language part of the Constitution.

A judicially implied limit on government power may have just as much popular support as an explicit one, but there is no conventional mechanism to express that support. An implication suggests that express constitutional provisions included acceptance of the implied principle, but an inference is not as conclusive as adoption of the express language. Public opinion polls, political demonstrations, and the behaviour of individuals and organisations may indicate that an implied principle is embedded in the society. A principle may be deeply embedded, as freedom of speech is in England, without being appropriate for use by the judiciary to override legislation. Failure to amend the Constitution to reverse the judicial implication of a constitutional limit is similarly inconclusive as an indicator of popular support for judicial protection of the principle. Amendment requires a supermajority, agreement on specific language, and overcoming indifference and inertia as well as active opposition. The difficulty of amendment is one illustration that an express constitutional provision satisfies the conventions for creating fundamental principles in a way that no evidence of support for an implied principle can match.

Educational Effect

Express protection of a constitutional freedom has the didactic advantage of putting the societal expression of basic principle in concrete form. The First Amendment to the United States' Constitution provides: 'Congress shall make no law ... abridging the freedom of speech, or of the press.'[6] An implied freedom does not have a similar fixed form. Mason

[5] A supermajority requirement goes beyond a simple majority: see, for example, s. 128 of the Commonwealth Constitution. Section 128 allows for alterations of the Constitution so long as there is a majority of the electorate as well as a majority of the States.

[6] Constitution of the United States, Amendment I.

CJ, Toohey and Gaudron JJ described the comparable constitutional freedom in Australia as:

> ... 'freedom of communication, at least in relation to public affairs and political discussion', 'freedom ... to discuss governments and political matters', 'freedom of communication about the government of the Commonwealth' which 'extends to all political matters', including 'matters relating to other levels of government', 'freedom of political discourse' and 'freedom of participation, association and communication in relation to federal elections'.[7]

Although there is acknowledgment that the last formulation differed substantially from the others, Mason CJ, Toohey and Gaudron JJ suggested the other phrases would serve as expressions of the constitutional principle. Precedent and convention may ultimately produce a single accepted verbal formula, but any court would be free to restate the principle in different words. It is the implication of the principle and not its specific wording that the courts claim is constitutionally binding.

Teachers can point to the First Amendment more easily than explaining *Australian Capital Television Pty Limited v The Commonwealth*[8] to their students. Students can readily memorise the Amendment's text and grasp the idea that constitutional text is fundamental. Teachers are therefore likely to discuss the express guarantee at an earlier point than the more complex phenomenon of an implied freedom. Any society, whether its constitutional guarantee is express, implied or nonexistent, can inculcate an understanding of the principles of freedom of speech, but it is easier to persuade children that the freedom is fundamental when it is stated expressly. English school children may be exposed to Milton[9] and Mill[10] and to the importance of free speech as declaimed in Hyde Park, and some Americans remain blissfully unaware of their constitutional rights (except as distorted on television). English school children learn that freedom of speech does not limit parliamentary power in their system of government. Where the principle of freedom of speech limits the legislature, students will be taught the reasons for the limitation, but disagreement with those reasons has different consequences when the principle is implied rather than express. If a student thinks the reasons for implying a freedom are weak, he or she is challenging whether the principle is fundamental. Disagreement with the rationale for an express freedom, however, does not threaten the perception that the principle is fundamental in this society. The embodiment of a principle in an express provision

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7 *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1, 11 (footnote citations omitted).

8 (1992) 177 CLR 106.

9 John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing, To the Parliament of England 1644* (London: N. Douglas, 1927).

10 John Stuart Mill, *On Liberty* (London: 1859; reprinted Harmondsworth, Baltimore: Penguin, 1974).

therefore gives it a momentum for acceptance by citizens that the judicial pronouncement of an implied freedom lacks.

Support for the Judicial Role

Disagreement with judicial interpretation of an express provision is not a challenge to the existence of the provision, and it rarely attacks the role of the court as interpreter. The principle was adopted by the people, and the issue is whether the court's particular application is correct. The court may be wrong, but it is the appropriate body to interpret express language in the Constitution.

The authority of the judiciary to imply a constitutional limit is itself implied from the Constitution. Where an implied freedom is in question, the challenge to the implication is closer to a criticism of the court's role — namely, the court is wrong because its appropriate role is limited to the interpretation of express language. The principle appears to have been judicially created, and the challenge is to its very existence.

It is easy to exaggerate the difference. Even judges who disagree with the implied right of political discussion agree that the Constitution gives rise to implications that limit government power.[11] The argument that it is improper for a judge to imply rights is a weak one. The stronger argument is that the particular right is not properly implied rather than a challenge to the court's role. Nevertheless, the implication of a constitutional freedom highlights the creative function of the court.

Difficulty of Termination

Only a constitutional amendment can abolish the First Amendment. Although there have been proposals to change the Constitution to overturn Supreme Court free speech decisions, most recently in response to the invalidation of a federal law against burning the flag,[12] none have yet passed the first step of securing Congressional approval.

The Australian High Court can overturn its decisions on freedom of political discussion. The court has changed its view on constitutional implications in the past. In the *Engineers case*,[13] for example, the High Court of Australia reconsidered whether the existence of State powers gave rise to an implied limit on national powers. The power to terminate an im-

[11] For example, 'an election in which the electors are denied access to the information necessary for the exercise of a true choice is not the kind of election envisaged by the Constitution': *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 187, per Dawson J.

[12] *Texas v Johnson*, 491 U.S. 397 (1989).

[13] *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129.

plied freedom by interpretation distinguishes it from the express clause at the level of the formal existence of a constitutional principle.

Whether an implied freedom is less protective than an express one depends primarily on factors external to the distinction between implied and express. During its first 130 years, the First Amendment to the United States' Constitution had no bite. At first, the Supreme Court interpreted freedom of speech to proscribe previous restraints on speech but not to prevent subsequent punishment 'of such as may be deemed contrary to the public welfare'.[14] Later it said the Amendment permits punishment of those who abuse freedom by utterances 'inimical to the public welfare, *tending* to corrupt morals, incite to crime, or disturb the public peace'.[15] Coupled with a deferential presumption in favour of the validity of legislation, this 'bad tendency' test invalidated no laws. After all, unless the government perceives a danger from speech, it has no reason to act. Holmes J changed his views on the First Amendment and began writing dissents in 1919 that urged more protection for speech.[16] Holmes and Brandeis JJ dissented in free speech cases for more than a decade before their views gained majority support.[17] The United States' Supreme Court, in 1954, upheld the imprisonment of a number of leading American communists despite free speech arguments.[18] In contrast, the Australian High Court was able to protect the existence of the Communist Party with no reference to any constitutional guarantee of free speech.[19]

Since judicial interpretation can render both express and implied freedoms ineffective, the insulation of an express provision from a formal repeal by the court is significant only to the extent that its formal existence is significant.

It is as unlikely that the High Court of Australia will reverse its decision on the implied freedom of political discussion as it is that the Supreme Court will revert to the hollow reading of the First Amendment. Precedent and the current domestic and international context of concern for human rights support a meaningful restriction on government power to interfere with political discussion. Nevertheless, the express provision supports judicial confidence in the appropriateness of the court's role to enforce the principle against other institutions of government. The lack of such demonstrated support may make courts more cautious in limiting government. Thus they may imply a freedom within a more limited

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[14] *Patterson v Colorado*, 205 U.S. 454 (1907).

[15] *Gitlow v New York*, 268 U.S. 652 (1925) (emphasis supplied).

[16] See *Abrams v United States*, 250 U.S. 616 (1919).

[17] *Gitlow v People of New York*, 268 U.S. 652 (1925) (Holmes and Brandeis JJ dissenting); *Whitney v California*, 274 U.S. 357 (1927) (Brandeis and Holmes JJ concurring). 'Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale': *United States v Dennis*, 341 U.S. 494 (1954).

[18] *U.S. v Dennis*, 341 U.S. 494 (1954).

[19] *The Amalgamated Engineering Union Australia Section and Rowe v The Commonwealth* (*Communist Party Dissolution case*) (1951) 83 CLR 1.

range than would be found for a provision that expressly articulated the principle.

The Consequences of Entrenchment

The vulnerability of an implied freedom to reversal or at least restricted application is arguably an advantage. Any constitutional provision may be unwise, because it enables the judiciary to overturn laws that the majority of the nation believes to be both desirable and consistent with freedom of speech. Defamation,[20] campaign spending reform,[21] and hate speech laws[22] are all examples of legislation that a majority may find appropriate, although a court may impose sharp limits on them. Although processes of government preclude any easy identification of Parliament with the will of the majority, the legislature is still a better reflection of popular will than the court.[23] Thus the more limited the judicial protection of a constitutional right, the more responsive the principle will be to the people.

A further argument against constitutionalising rights is that it may encourage people to rely on the court at the expense of the political process. This can lead to the loss of the principle's vitality in society as a whole because it is not debated in the political forum.[24] Even advocates of judicial activism in the United States are now urging greater focus on the political process.[25] This argument is very contextual, for there may be no discussion and no protection of any sort in the absence of an express provision. In a modified form, however, it has been a popular argument in Australia. Where there is a tradition of freedom of speech, the people may be trusted to care for it.[26]

The United States has been less trusting of the people. The purpose of an individual rights guarantee, such as freedom of speech, is to limit the power of government over the individual. Proponents of such guaran-

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[20] See *New York Times v Sullivan*, 376 U.S. 254 (1964) [U.S.]; *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1 [Australia].

[21] See *Buckley v Valeo*, 424 U.S. 1 (1976) [U.S.]; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 [Australia].

[22] *R.A.V. v City of St. Paul* 112 S. Ct. 2538 (1992); see David Bogen, 'A United States Perspective on the Racial Hatred Bill 1994' [unpublished manuscript on file with the Review].

[23] See Gabriel A. Moens, 'The Wrongs of a Constitutionally Entrenched Bill of Rights', in M.A. Stephenson and Clive Turner (eds), *Australia: Republic or Monarchy* (Brisbane: University of Queensland Press, 1994); Jeremy Waldron, *Liberal Rights: Collected Papers 1981–91* (Cambridge: Cambridge University Press, 1993).

[24] See Paul Brest, 'Constitutional Citizenship' (1986) 34 *Cleveland State Law Review* 1.

[25] Robin West, 'Progressive and Conservative Constitutionalism' (1990) 88 *Michigan Law Review* 641.

[26] See R.C.L. Moffatt, 'Philosophical Foundations of the Australian Constitutional Tradition' (1965) 5 *Sydney Law Review* 85, 86; Owen Dixon, 'Two Constitutions Compared', in Hon. J. Woinarski (ed.), *Jesting Pilate and other Papers and Addresses* (Sydney: Law Book Co., 1965), 100; Robert Menzies, *Central Power in the Australian Commonwealth* (London: Cassell, 1967), 54.

tees are not dismayed by popular disagreement with particular decisions that restrict government. Conflict over the application of principles is inevitable, and a check outside the legislature helps to assure that the resolution does not always favour government.

THE DERIVATION OF AN IMPLIED FREEDOM

An implication is a product of a chain of reasoning and the court is likely to articulate its basis. The Australian guarantee of freedom of political discussion is inferred from the principle of representative democracy.[27] The rationale for an express freedom may be less clear. The First Amendment does not state its rationale, and multiple justifications have been urged, with sometimes inconsistent effects on the scope of the provision and the standards under it. Changing an implied freedom into an express one may increase judicial discretion by expanding the possible supporting rationales and encouraging courts to be less deferential to government.

The Articulation of Rationale

A court construing an express provision can discuss and explore thoroughly its rationale, while one that has an implied freedom may rely on precedent rather than discussion in future decisions. The tendency, however, is likely to be to the contrary. Where a principle is expressly stated in the Constitution, the particular rationale may not be critical to its application and a court need not be concerned with persuading the public that it is acting appropriately in enforcing the principle. On the other hand, the legitimacy of the court's action in applying an implied principle depends upon the rationale, so the court is more likely to refer to it. The need to recur to the rationale for the implied freedom keeps the rationale vital in a way related to the vitality produced by forcing the principle to be the subject of political debate. The principle may be better understood because it is not just the principle, but its rationale as well that must be discussed.

This does not mean there is only one possible rationale for implying a freedom. The opinions found in recent decisions of the High Court of Australia vary. McHugh J[28] implied from the express provisions on election that candidates must be able to present their views to the electorate

[27] *Theophanous v Herald & Weekly Times Ltd* (1994) 124 ALR 1, 11.
[28] *Id.* 71–77, per McHugh J dissenting.

after the election is called. Mason CJ,[29] Gaudron[30] and Brennan JJ,[31] *inter alia*,[32] found in provisions on constitutional amendment as well as those on elections an implication of representative democracy that extends to discussion among individuals of any political issue. Toohey and Deane JJ[33] have even suggested there are fundamental rights implied in the very formation of the Constitution.[34] The point is not that there can be only one basis to imply freedom of speech, but that the absence of an express provision requires the court to articulate the basis for its decision in terms of an underlying rationale.

The Possibility of Multiple Rationales

The First Amendment lacks the single coherent rationale. It reflected widespread fear that the national government would seize power and engage in legislation restricting speech — if restrictions were warranted, it was thought to be a matter for state law. At this general level, few people had and few needed any specific definition for the concept.[35] Most of the philosophical justifications for the provision have been articulated after the clause itself was adopted.

In the 19th century, Mill[36] argued for freedom of speech as the best mechanism for attaining truth. This theory was seized upon by Holmes J in *Abrams v U.S.*[37] when he dissented, stating, 'The best test of truth is the power of the thought to get itself accepted in the competition of the market.'

In the 20th century, Alexander Meiklejohn contended that freedom of speech was a necessary precondition for self-government.[38] His views on the scope of protection broadened dramatically in response to Professor Zechariah Chafee's critique.[39] The theory of democratic self-government underlies the Australian High Court's decisions, and it is evident in numerous American cases including *New York Times v Sullivan*.[40]

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[29] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 139.
[30] *Id.* 221.
[31] *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1, 48.
[32] *Id.* 72–75, per Deane and Toohey JJ; Leighton McDonald, 'The Denizens of Democracy: The High Court and the "Free Speech" Cases' (1994) 5 *Public Law Review* 160.
[33] *Leeth v The Commonwealth* (1992) 174 CLR 445, 485–7; L. Zines, 'A Judicially Created Bill of Rights' (1994) 16 *Sydney Law Review* 166, 180–4.
[34] See *Leeth v The Commonwealth* (1992) 174 CLR 455, 485–7, per Deane and Toohey JJ dissenting.
[35] See David Bogen, *Bulwark of Liberty* (New York: Associated Faculties Press, 1984).
[36] Mill, *supra* n. 10.
[37] 250 U.S. 616 (1919).
[38] Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper, 1948).
[39] Rodney Smolla, *Free Speech in an Open Society* (New York: Knopf, 1992), 15–16.
[40] 376 U.S. 254 (1964).

Self-government and the search for truth are instrumental justifications for freedom of speech — that is, the court protects free speech in order to attain a higher end. There are a number of other justifications of this nature that receive less attention in the literature. Brandeis J once wrote, 'Sunlight is said to be the best disinfectant.'[41] It is better to permit people with despicable views to air them than to forbid their utterance because (1) it gives them a release, like the steam valve, to prevent their grievance from festering and forcing them to violent reaction; (2) it opens their views to rebuttal that may change their opinions; and (3) it enables society to know where the dangers may come from. Another argument for freedom of speech put forward by Lee Bollinger is that it benefits the character of society to be tolerant.[42]

A very different philosophical base for freedom of speech focuses on the speaker rather than the society's interest in allowing speech. Brandeis J argued that 'free speech is valuable both as an end and as a means'. Concurring in *Whitney v California*,[43] he said, '[T]hose who won our independence believed that the final end of the state was to make men free to develop their faculties.'

The various strands of justification often unite when the court discusses the principle of free speech. Kennedy J stated, 'At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal.'[44]

The multiplicity of rationales means the principle may extend farther than any single rationale would justify. The search for truth or concerns for self-government may underlie the protection of the distribution of mechanically reproduced speech while concern for self-realisation supports the Amendment's application to nude dancing.

The multiple rationales may also complicate the standards used and add to the uncertainty of results reached. Where multiple rationales are available, emphasis on one rationale over another can be used to contract the scope of the guarantee or to weaken the standard used to judge constitutionality. Commercial speech[45] and appeals to sexuality,[46] for example, are sometimes discussed as lesser forms of protected speech which receive a lower standard of protection.

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[41] Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (New York: Stokes, 1914).

[42] Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: Oxford University Press, 1986).

[43] 274 U.S. 357 (1927).

[44] *Turner Broadcasting System v Federal Communications Commission* 114 S. Ct. 2445, 2458 (1994).

[45] *Central Hudson Gas & Electric Co. v Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980).

[46] 'Society's interest in protecting this type of expression is of a wholly different, and lesser magnitude than the interest in untrammelled political debate': *Young v American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (Stevens J).

Insistence on a single rationale for the protection of freedom of speech has the weakness that repudiation of that rationale eliminates the principle. Where multiple rationales support a principle, the elimination of one may not prove fatal. In core areas, the principle is supported by all its rationales.

CONSTRAINING THE EXPRESS PROVISION

The express provision for freedom of speech in the United States offers great discretion to the courts because choice can be made from a variety of rationales. It is not unreasonable for a society to believe that some of these rationales do not justify invalidating laws made by majoritarian institutions while others do, and to consider appropriate methods of limiting the scope of the provision. A common form in some of the original declarations of rights in the states was to include a preamble that discussed reasons for the commands that followed. A statement of the principle in terms of its rationale or with a preamble that pointed to the rationale could serve equally well to confine the principle to the specific rationale.[47]

Opponents of the implication of rights might be tempted to support an express guarantee as a means of restraining the court on the theory that it would not go beyond the limits justified by the language of the express guarantee. The express nature of the provision has not been a significant limitation on the court's interpretive discretion in the United States. The words 'freedom of speech and of the press' are capable of application to all forms of speech and publication whether public or private, commercial or altruistic, gossip or philosophy, sex or science. The words do not preclude the court from extending their express scope by implication. The Supreme Court has reasoned that freedom of speech implies freedom of association. The communication of ideas requires an audience.[48] Speech, in the sense of language, is only one medium for communicating ideas. Recognising that sign language is a form of speech is only a small step from finding that any means of communicating ideas is within the scope of freedom of speech and press. Scalia J, of the Supreme Court, has insisted that conduct is not protected by the First Amendment unless the rationale for its regulation is the suppression of its communicative aspects.[49] The remaining members of the court, however, have swept nude dancing and flag burning into the protected area of the First Amendment.

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[47] Such a constraint is only relative. The words themselves would not be determinative. See Anthony D'Amato, 'Can Legislatures Restrain Judicial Interpretation of Statutes?' (1989) 75 *Virginia Law Review* 561.

[48] *NAACP v Button*, 371 U.S. 415 (1963).

[49] *Barnes v Glen Theater*, 501 U.S. 560 (1991).

CONCLUSION

If the Australian people decide to adopt an express guarantee of freedom of speech by amendment to their constitution, it is likely to encourage the High Court to take an expansive view of that protection. The scope of the freedom may be described with greater precision and the rationale made express as ways to confine the court to the policy of protecting self-government. Nevertheless, the announcement of that principle by express constitutional proclamation would reaffirm the correctness of the court's perception that it is a basic principle of Australian society and would be likely to encourage the justices to act more boldly in giving it content.